



Cooperation with the States
The Endangered Species Act Section 6 Program
Annual Review Guidance for States

INTRODUCTION

Section 6 of the Endangered Species Act (ESA) provides a mechanism for cooperation between NOAA's National Marine Fisheries Service (NMFS) and the States for the purposes of conserving endangered and threatened species, candidate species, and recently de-listed species. Under section 6, NMFS may enter into an agreement with any State that "establishes and maintains an adequate and active program for the conservation of endangered and threatened species" (16 USC 1535). On an annual basis, NMFS is required to reconfirm the findings that the state program is adequate and active and meets the requirements of section 6(c) of the ESA (16 USC 1535; 50 CFR 222.103). This document provides guidance on completing the annual review of ESA section 6 agreements.

DEFINITIONS

All terms used are as defined in section 3 of the ESA. The definition of the term "State", however, will now include the U.S. flag islands/commonwealths that were once considered part of the Trust Territory of the Pacific Islands. For the purposes of this guidance, the term "Secretary" refers to the Secretary of Commerce, whose responsibilities under section 6 have been delegated to NOAA's Assistant Administrator for Fisheries.

BACKGROUND: ANNUAL REVIEW OF AGREEMENTS

In order to initially enter into a section 6 agreement, a State's program must meet the five findings of section 6(c)(1) (full agreement) or meet three of those five findings (limited agreement) (Box 1). For limited agreements, plans must also be included under which immediate attention will be given to those resident species which are determined by the Assistant Administrator or the State agency to be endangered or threatened and which the Assistant Administrator and State agency agree are in most urgent need of conservation. According to NMFS regulations, the "agreement, as well as the Assistant Administrator's finding upon which it was based, must be reconfirmed annually to ensure that it reflects new laws, species lists, rules or regulations, and programs, and to demonstrate that it is still adequate and active" (50 CFR 222.103). Therefore, at the conclusion of an annual review of a State's program, the Assistant Administrator must find whether the State's program continues to meet requirements (A) – (E) for a full agreement or requirements (C) – (E) for a limited agreement (Box 1).

Box 1. Findings from section 6(c)(1), which applies to animals species:

(A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

Limited agreements (animals)

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened.

With the exclusion of criterion (D) above, the same requirements must be met in order for a State to have entered into an agreement for plant species. Currently, NMFS does not hold any agreements specifically for plant species. Plant and animal species may also be combined into one agreement.

At the conclusion of a review, if the Assistant Administrator is unable to find that a particular program meets the requirements of section 6, either the agreement must be terminated or a new agreement negotiated. If the agreement is to be renegotiated, NMFS will work with the particular State agency(ies) to identify areas of program development or implementation that would allow the Assistant Administrator to reconfirm the basis for an agreement. Appropriate changes must be made by June 30th of the following year to avoid termination of the agreement. If the agreement is to be terminated or renegotiated, NMFS will provide reasonable notice to the State in accordance with the terms of the agreement.

ANNUAL REVIEW REQUIREMENTS

The goal of the annual review process is to demonstrate that the State agency(ies) that entered into the agreement retains the authority, plans, programs, and capability to maintain a program for the conservation of resident endangered and threatened species in accordance with the purposes and policies of the ESA. The review process is also an opportunity for the State agency to update its agreement (e.g. to add species to the agreement) and communicate program priorities and accomplishments. To assist NMFS in making its determination, the State

agency(ies) that entered into the agreement should submit the documentation and information listed below.

State Laws

- **A memorandum of law from the State’s Attorney General’s Office, or from other counsel authorized by the State to issue formal legal opinions on its behalf, analyzing any changes in state statutory or regulatory authority that may affect the protection and conservation of endangered and threatened fish or wildlife, if any changes were made since the date of the previous review.** If no changes have been made since the previous review, a statement to that effect is all that is required. If statutory or regulatory changes have been made that do not significantly impact the State’s authorities or ability to conserve threatened and endangered species (e.g. a new species has been added to the State’s endangered species list), then a description of these changes should be provided. If statutory or regulatory changes have been made that significantly alter the State’s authorities or ability to protect and conserve endangered and threatened species, then the State’s Attorney General’s Office, or other counsel authorized by the State to issue formal legal opinions on its behalf, should be asked to provide a memorandum describing whether the State agency(ies) still meets with the requirements of section 6(c).
 - Note that if any amendments to the ESA or changes to NMFS’ implementing regulations have been made since the previous review, changes to the State’s program may be required in order for it to remain adequate and active.

Conservation Program

- **An updated list of resident federal and state-listed endangered and threatened species within the jurisdiction of NMFS and a description of any changes to the list or the State listing process since the date of the previous review.** This may also include a statement of any modifications the State wishes to propose to the list of species included on the section 6 agreement.
- **A description of any substantial changes proposed for the state program or changes that have occurred since the last review.** This information may include, for example, a brief description of changes or proposed changes in the agency’s conservation priorities or the scope of existing programs, as well as any staff changes that may affect the agency’s programs.
- **Copies of reports that may have been prepared since the previous review that discuss the State’s conservation program accomplishments.** Although information on program accomplishments for species named in the agreement is most relevant here, these reports may include information for marine and anadromous species beyond those named on the agreement or projects on resident listed species that were funded through other programs (e.g. right whale recovery efforts). As part of this requirement, copies of any progress reports or final reports for projects funded under the ESA section 6 program that have been prepared since the previous review should also be submitted if they are requested by the NMFS Regional Section 6 Coordinator.
- **A list of the number of specimens of each species listed in the agreement taken by employees or agents of the State agency pursuant to an ESA scientific research or**

enhancement permit or in accordance with NMFS' implementing regulations, the purposes for which they were taken, and any mortalities or injuries resulting from the taking. This list should encompass all activities (e.g. scientific research, stranding response networks, incidental take) and not just those supported by section 6 funding.

THE REVIEW PROCESS

June 15th: The NMFS Regional Office sends reminder letters and instructions to States by June 15th each year.

June 30th: Information is submitted by the State to the NMFS Regional Office by June 30th. The NMFS Regional Office reviews the State's information and completes applicable requirements of section 7 of the ESA and the National Environmental Policy Act. Once the Regional review is complete, the package is transmitted to NMFS Headquarters for review and concurrence with the Regional Office's recommendation on whether to reconfirm the basis for the agreement.

October 1st: NOAA's Assistant Administrator for Fisheries sends written notification of the outcome of the review to the State by October 1st. If the agreement is being amended through the annual review process (e.g. a species is added to the agreement), the Assistant Administrator will also sign and send two copies of the amended agreement to the State. One copy of the amended agreement should be countersigned by the State and mailed back to the Section 6 Coordinator at the NMFS Headquarters Office. Pending completion of NMFS' review, the State's section 6 agreement remains in force and effect, and any delay in meeting either the June 30th or Oct 1st deadlines would not result in suspension of funds for any section 6 grants.

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